

FILED

MAR 27 2003

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
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IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

KENNETH F. McMAHAN and
BETTY F. McMAHAN,

Plaintiffs,

vs.

FIRST UNION NATIONAL BANK,
OCWEN FEDERAL BANK, and
LONG BEACH MORTGAGE COMPANY,

Defendants.

CIVIL ACTION NO. SA-01-CA-782-FB

ORDER ACCEPTING MEMORANDUM AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

Before the Court is the Memorandum and Recommendation of the United States Magistrate Judge (docket no. 14), plaintiff's written objections (docket no. 17), and defendants' response (docket no. 16).

Where no party has objected to a Magistrate Judge's Memorandum and Recommendation, the Court need not conduct a de novo review of the Memorandum and Recommendation. See 28 U.S.C. § 636(b)(1) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings and recommendations to which objection is made."). In such cases, the Court need only review the Memorandum and Recommendation and determine whether it is clearly erroneous or contrary to law. United States v. Wilson, 864 F.2d 1219, 1221 (5th Cir.), cert. denied, 492 U.S. 918 (1989).

On the other hand, any Memorandum and Recommendation to which objection is made requires de novo review by the Court. Such a review means that the Court will examine the entire record, and will make an independent assessment of the law. The Court need not, however, conduct

a de novo review when the objections are frivolous, conclusive, or general in nature. Battle v. United States Parole Comm'n, 834 F.2d 419, 421 (5th Cir. 1987).

The Court has thoroughly analyzed the plaintiffs' submission in light of the entire record. As required by Title 28 U.S.C. § 636(b)(1)(c), the Court has conducted an independent review of the entire record in this cause and has conducted a de novo review with respect to those matters raised by the objections. After due consideration, the Court concludes plaintiffs' objections lack merit. Plaintiffs' home equity loan was found to be valid by this Court, the Fifth Circuit Court of Appeals and the Texas Supreme Court. Despite the clear authority of these courts, plaintiffs filed this suit challenging the loan. Defendant filed a counterclaim and moved for summary judgment arguing that res judicata bars plaintiffs' claims. They also filed a motion pursuant to Federal Rule of Civil Procedure 11 seeking sanctions in the amount of \$13,500 against plaintiffs and their counsel for filing a frivolous lawsuit and refusing to dismiss the same. Plaintiffs did not answer defendants' counterclaim or respond to the motion for summary judgment, the supplement thereto, or motion for sanctions. Other than their objections to the Memorandum and Recommendation, plaintiffs have not submitted any pleading or other document to the Court since November of 2001. The Magistrate Judge, inter alia, recommends defendants' motion for summary judgment and motion for sanctions be granted.

In their objections, plaintiffs state that the circumstances and legal distinctions between this and the first case mitigate against finding that plaintiffs' violated principles of res judicata. As discussed by the Magistrate Judge, plaintiff should have raised all arguments in their previous attempt to challenge defendants' lien and the underlying loan obligation to avoid the bar of res judicata. Regarding rule 11 sanctions, plaintiffs' state that Ms. McMahan, now a widow, "decided to quit the

contest and seek settlement,” but defendants did not respond. Even if true, this does not explain plaintiffs’ failure to prosecute their case. To this Court’s knowledge, the lack of participation by either side is not considered evidence of settlement negotiations for rule 11 purposes. Plaintiffs chose to file this lawsuit despite the clear authority that challenges to the loan secured by their home were without merit and then failed to respond to the motion for summary judgment, supplement thereto or motion for rule 11 sanctions. For these and the reasons discussed by the Magistrate Judge, this Court is of opinion that the imposition of the requested sanction is an appropriate exercise of discretion notwithstanding plaintiffs’ objection that it was Mrs. McMahan’s intent to seek a settlement.

ACCORDINGLY, IT IS ORDERED that the Memorandum and Recommendation of the United States Magistrate Judge (docket no. 14) is ACCEPTED pursuant to 28 U.S.C. § 636 (b) (1) such that: (1) defendants’ motion for summary judgment is GRANTED such that (a) all of plaintiff’s claims are DISMISSED With PREJUDICE, (b) defendants are AWARDED judgment on their counterclaims consistent with the proposed final judgment submitted by defendants with their supplement to the motion for summary judgment (attached hereto as “Exhibit A”); (2) defendants’ motion for sanctions is GRANTED such that defendants are awarded \$13,500, for which plaintiffs and their attorney, Darrell Smith, are liable jointly and severally. However, the sanction amount of \$13,500 shall first be collected, if possible, from proceeds of the foreclosure and subsequent sale of the subject property thereof at fair market value. To the extent there may be any dispute about fair sale price and crediting of proceeds to amounts owed by plaintiffs and their attorney, this Court will retain jurisdiction; and (3) plaintiffs are PROHIBITED from refiling their claims against these defendants or their successors or assignees in any federal court without first obtaining permission of

a United States Judge, and the Clerk of the Court SHALL refuse any attempted filing by them without prior approval of a United States Judge.

It is so ORDERED.

SIGNED this 27th day of March, 2003.

A handwritten signature in black ink, appearing to read "Fred Biery", is written over a horizontal line.

FRED BIERY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FILED

MAR 27 2003

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS

BY DEPUTY CLERK

C.A. NO.: SA-01-CA-0782

KENNETH F. MCMAHAN and
BETTY F. MCMAHAN

VS.

FIRST UNION NATIONAL BANK,
OCWEN FEDERAL BANK AND
LONG BEACH MORTGAGE
COMPANY

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Came on for consideration the Motion for Summary Judgment filed by Defendants FIRST UNION NATIONAL BANK, OCWEN FEDERAL BANK and LONG BEACH MORTGAGE COMPANY. The Court, having considered the motion and the response thereto (if any), is of the opinion that Defendants are entitled to summary judgment. It is, therefore, ORDERED that:

- a. Plaintiffs, KENNETH F. MCMAHAN and BETTY F. MCMAHAN take nothing against Defendants, FIRST UNION NATIONAL BANK, OCWEN FEDERAL BANK and LONG BEACH MORTGAGE COMPANY, and their claims are dismissed with prejudice;
- b. the lien of Defendant, FIRST UNION NATIONAL BANK, on that certain real property described in Exhibit "A" to this Judgment, attached, commonly known as 102 Sisterdale Road, Boerne, Kendall County, Texas, title in the name of Kenneth F. McMahan and Betty F. McMahan (the "Property"), in the amount of Two Hundred Eleven, Six Hundred Sixty One and 38/100 DOLLARS (\$211,661.38) DOLLARS, including attorney fees of \$13,500, plus post-judgment interest thereon at the rate allowed by law from the date hereof until the date of sale, is hereby established and foreclosed, and that an Order of Sale be issued to allow any marshal, sheriff or constable within the State of Texas to seize the Property and sell the same as under execution in satisfaction of this Judgment; and
- c. Defendant FIRST UNION NATIONAL BANK shall not have any deficiency judgment or other money judgment against Plaintiffs after the sale of the Property



and no other property of Plaintiffs other than the Property shall be sold or taken to satisfy this Judgment.

All that certain tract or parcel of land containing 4.995 in Kendall County, Texas, out of the Newton & Taylor Survey No. 181, Abstract 361, being the same tract of land described in conveyance to Kenneth F. McMahan and wife, Betty F. McMahan, of record in Volume 249, Page 764, Deed Records of Kendall County, Texas.

Said 4.995 acre tract, being more particularly described by metes and bounds as follows:

BEGINNING: at a fence corner post found on the West right-of-way line of F. M. Road No. 1376, (Sisterdale Road) at the Northeast corner of Lot 1, KENDALL OAKS, of record in Volume 1, Page 4, Plat Records of Kendall County, Texas, for the Southeast corner of this herein described tract;

THENCE: North 88 deg. 48 min. 14 sec. West, a distance of 449.71 feet along with fence line on the North boundary line of said Lot 1, KENDALL OAKS, to a ½" iron pin found at a corner of said Lot 1, KENDALL OAKS, and same being the Southeast corner of said Lot 25, 2.620 acre tract, ELM SPRINGS, of record in Volume 1, Page 117, Plat Records of Kendall County, Texas, for the Southwest corner of this herein described tract;

THENCE: along with the East boundary line of said ELM SPRINGS, the following courses and distances:

North 00 deg. 29 min. 41 sec. West, 334.13 feet to a ½" iron pin found and

North 00 deg. 37 min. 24 sec. West, 149.92 feet to a ½" iron pin found at the Northeast corner of Lot 24, said 2.999 acre tract, said ELM SPRINGS, at the Southwest corner of Erwin Batha, et ux, 3.807 acre tract, of record in Volume 269, Page 824 Deed Records of Kendall County, Texas, for the Northwest corner of this herein described tract;

THENCE: South 88 deg. 43 min. 45 sec. East, (Based Recorded Deed Bearing) a distance of 451.08 feet along with fence line on the South boundary line of said Batha, et ux, 3.807 acre tract to a ½" iron pin found on the West right-of-way of said F. M. Road No. 1376 (Sisterdale Road) at the Southeast corner of Edwin Batha, et ux, 3.807 acre tract, for the Northeast corner of this herein described tract;

THENCE: South 00 deg. 26 min. 04 sec. East, along with the West right-of-way line of said F. M. Road No. 1376 (Sisterdale Road) at 278.65 feet passing a concrete highway right-of-way monument and continuing in all a total distance of 483.44 feet to the POINT OF BEGINNING.

